Supreme Court, U.S.
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No. 99-1980

IN THE

Supreme Court of the United States

NEXTWAVE PERSONAL COMMUNICATIONS INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition fundamentally misstates—and fails even to defend—the Second Circuit's key jurisdictional holding. Respondent studiously ignores the court of appeals' express reliance on "exclusive" jurisdiction statutes as the basis for rejecting bankruptcy jurisdiction here, presumably because respondent recognizes that the reasoning and holding actually expressed in the opinion below are indefensible in light of the unambiguous text of 28 U.S.C. § 1334(b) and are irreconcilable with decisions of other circuits and of this Court. Respondent's disingenuous attempt to recharacterize the judgment below cannot succeed. The court of appeals' actual holding is unmistakably clear, and respondent's proffered alternative is both factually and legally flawed.

Similarly unavailing are respondent's attempts to explain away the conflicts between the judgment below and the decisions of other courts with respect to the second question presented. This Court's review is necessary to resolve the conflicts created or exacerbated by the decision below.

I. The Second Circuit's Denial Of Bankruptcy Court Jurisdiction Conflicts With Decisions Of Other Courts of Appeals And This Court

1. Respondent fails to rebut NextWave's showing that the Second Circuit's denial of bankruptcy jurisdiction in this case squarely contradicts Congress's comprehensive grant of bankruptcy jurisdiction in 28 U.S.C. § 1334(b) and conflicts with numerous decisions of other courts of appeals and this Court.

Section 1334(b) unambiguously grants the bankruptcy and district courts jurisdiction over *all* bankruptcy-related proceedings, "*[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts.*" 28

U.S.C. § 1334(b) (emphasis added). Despite this comprehensive grant of jurisdiction, the court of appeals rejected bankruptcy jurisdiction in reliance on the very type of exclusive-jurisdiction statutes that § 1334(b)'s "notwithstanding" provision expressly trumps. *See* Pet. App. 21a, citing 28 U.S.C. § 2342 and 47 U.S.C. § 402(b).

Respondent does not even attempt to defend the jurisdictional holding actually announced by the court of appeals. Instead, respondent contends that the Second Circuit's jurisdictional holding was not based on Congress's grant of exclusive jurisdiction to other *courts*, but rather on the exclusive jurisdiction of the FCC to grant radio licenses. Opp. 14-15. Respondent's characterization of the decision below is, quite simply, false. As even a cursory reading of the Second Circuit's opinion makes clear, the court expressly and unambiguously predicated its denial of bankruptcy and district court jurisdiction on Congress's grant of exclusive jurisdiction to the courts of appeals to review "regulatory" actions of the FCC: "*Because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals*, *see* 28 U.S.C. § 2342; 47 U.S.C. § 402, the bankruptcy and district courts lacked jurisdiction to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses." Pet. App. 21a (emphasis added). Wholly unable to defend this holding of the court of appeals, respondent simply pretends that it does not exist. Respondent's subterfuge cannot conceal the true nature of the decision below.[1]

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[1] As noted in the petition (Pet. 9 n.3), the Second Circuit's subsequent mandamus decision in this same litigation confirms this reading of the court's holding. *See In re FCC*, 217 F.3d 125 (2d Cir. 2000), *petition for cert. filed*, No. 00-___ (Sept. 21, 2000). In that decision, the court of appeals

Respondent's reliance on *Board of Governors v. MCorp Financial, Inc.*, 502 U.S. 32 (1991), is entirely misplaced. *MCorp* involved a debtor's attempt to invoke the bankruptcy jurisdiction to enjoin ongoing proceedings in two administrative enforcement actions that were pending before the Federal Reserve Board. This Court held that the district court lacked jurisdiction to grant such relief, relying on 12 U.S.C. § 1818(i)(1), which stated that "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order." 502 U.S. at 39, 44. As for 28 U.S.C. § 1334(b)'s grant of jurisdiction, the Court observed that "Section 1334(b) concerns the allocation of jurisdiction between bankruptcy courts and other '*courts*,' and, of course, an administrative agency such as the Board is not a 'court.'" 502 U.S. at 41-42. Thus, *MCorp* held only that "the grant of jurisdiction in § 1334(b) to district courts sitting in bankruptcy did not authorize an injunction against a regulatory proceeding" where there was "'specific preclusive language'" in another statute denying *any* court jurisdiction over the agency's actions. *Celotex Corp. v. Edwards*, 514 U.S. 300, 311 (1995).

In this case, by contrast, there is no "specific preclusive language" forbidding judicial review of FCC actions. Respondent's suggestion (Opp. 15, 18) that the FCC's licensing decisions are immune from judicial review is simply incorrect. *See, e.g., Trinity Broad. of*

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denied bankruptcy-court jurisdiction to enforce the automatic stay and other provisions of the Bankruptcy Code against the FCC's purported cancellation of NextWave's licenses, reasoning that "[e]xclusive jurisdiction to review the FCC's regulatory action *lies in the courts of appeals*." *Id.* at 139 (citing Second Circuit's decision in this case) (emphasis added). Plainly, the Second Circuit does not share respondent's view of the nature of its jurisdictional holding in this case.

Fla., Inc. v. FCC, 211 F.3d 618 (D.C. Cir. 2000) (overturning FCC's denial of licensee's renewal application); *Orion Communications Ltd. v. FCC*, 131 F.3d 176 (D.C. Cir. 1997) (reversing FCC's licensing decision and ordering company's reinstatement as interim licensee); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987) (vacating FCC order dismissing license applications). Thus, *MCorp* is of no assistance to respondent.[2]

Also contrary to respondent's assertions, the bankruptcy and district courts did not purport to "exercise the agency's federal administrative and regulatory authority over the issuance and allocation of spectrum licenses," nor did they decide "to whom [the licenses] would be granted." Opp. 18, 15. The FCC, not the bankruptcy court, decided to grant the licenses to NextWave in February 1997. Pet. App. 5a-6a. The bankruptcy court merely exercised its authority under 11 U.S.C. § 544 to

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[2] Respondent argues in the alternative that "because even the D.C. Circuit did not have jurisdiction over NextWave's challenge to the FCC's orders at the time the bankruptcy court acted—the D.C. Circuit dismissed the petition for review as jurisdictionally premature—there was no basis for any allegedly corresponding jurisdiction in the bankruptcy court." Opp. 18 n.9. That argument is meritless. In the first place, respondent's argument assumes that bankruptcy jurisdiction "correspond[s]" to, and is subject to the same limitations as, the jurisdiction granted to the courts of appeals under 28 U.S.C. § 2342 and 47 U.S.C. § 402, but 28 U.S.C. § 1334 is not so limited. *See, e.g., In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1154-55 (9th Cir. 1992) (exhaustion of administrative remedies not a prerequisite to bankruptcy jurisdiction). Second, respondent errs in suggesting that NextWave's avoidance action sought review of non-final FCC orders. The "orders" referenced (but not cited) by respondent did not purport to address NextWave's Section 544 claim, nor does this case seek judicial review of those orders.

adjust the amount of NextWave's obligation on the promissory notes in order to reflect the fair market value of the licenses at the time they were granted, thereby making possible a fair and equitable distribution to all of NextWave's creditors. Far from constituting the exercise of a "regulatory" function, that application of Section 544 represented a core bankruptcy function under 28 U.S.C. § 157(b)(2)(H).

2. Respondent also fails to rebut NextWave's showing that the Second Circuit's decision conflicts with decisions from other circuits addressing the comprehensive scope of bankruptcy and district court jurisdiction under 28 U.S.C. § 1334(b). Indeed, respondent's sole attempt to distinguish the cases identified in the petition serves only to confirm the existence of a direct conflict on this issue.

Respondent asserts that "[t]he other appeals court decisions upon which [NextWave] relies *all deal with court*, not agency, jurisdiction." Opp. 15 (emphasis added). But as demonstrated above, the same is true here. The Second Circuit's jurisdictional holding is clearly predicated on the "exclusive" jurisdiction of the *courts of appeals* to review FCC licensing decisions: "Because jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in *the federal courts of appeals*, *see* 28 U.S.C. §2342; 47 U.S.C. §402, the bankruptcy and district courts lacked jurisdiction . . . ." Pet. App. 21a (emphasis added). Thus, the court of appeals decisions principally relied upon by NextWave are squarely on point, precisely because both they and the decision below *do* "deal with court, not agency, jurisdiction." Opp. 15.

3. Respondent's arguments also highlight an additional circuit conflict that warrants this Court's review. Under 28 U.S.C. § 1334(e), bankruptcy courts possess exclusive jurisdiction over all "property of the estate." By rejecting bankruptcy jurisdiction in this case, the court of appeals necessarily held that FCC licenses are

not "property of the estate" and therefore fall outside the scope of this jurisdictional grant. Recognizing the need to defend that holding, respondent contends that "spectrum licenses are not property, much less property of the estate." Opp. 16.

As noted in the petition, that holding creates a circuit conflict. Pet. 12 n.6. In *In re Central Ark. Broad. Co.*, 68 F.3d 213 (8th Cir. 1995), for example, the Eighth Circuit explained that the "primary issue" it had to decide in that case was "whether a Chapter 7 debtor's radio station operating license . . . was a valuable intangible asset that qualified as *property of the bankruptcy estate*." *Id.* at 214 (emphasis added). The court decided that issue in the affirmative, holding that "[i]n view of the broad definition of property under [28 U.S.C. 541(a)(1)], . . . the license was property of the estate." *Id.* at 214-15. The Second Circuit's jurisdictional holding in this case plainly conflicts with the *Central Arkansas* decision, as well as the other court of appeals decisions cited in the petition. Pet. 8-12.

II. The Second Circuit's Decision On The Merits Conflicts With Decisions Of Other Courts Of Appeals And This Court

1. Respondent fails to rebut NextWave's showing that the decision below conflicts with other court of appeals decisions holding that an agency is not entitled to deference in interpreting its own contracts. Respondent does not dispute that by deferring to the FCC's construction of its regulations in determining when NextWave's payment obligation arose, the Second Circuit was deferring to the FCC's interpretation of its own contractual relationships. Nor does respondent dispute that regulatory documents can create enforceable contractual obligations. Respondent contends, however, that "[t]he interpretation at issue in this case *was not simply an interpretation of petitioner's contract*," because it was also "a construction of the regulatory

scheme" for allocating spectrum licenses. Opp. 24 (emphasis added).

That assertion does nothing to distinguish the cases identified in the petition. To the contrary, those cases deny deference to an agency's interpretation of its own contracts, regardless of whether those contracts are comprised of regulatory documents. For example, the First Circuit held in *Meadow Green-Wildcat Corp. v. Hathaway*, 936 F.2d 601 (1st Cir. 1991) (Breyer, J.), that the governmental land use permits at issue there were contractual in nature, and therefore could not justify deference to the agency's interpretation, even though they were issued pursuant to the agency's regulatory authority and were contained in regulatory documents. The court held that "it would seem surprising and unfair if the terms of [the land use permit], without so stating, bind the [private party] but leave the [agency] free to interpret those same terms as it wishes (limited only by the bounds of 'reasonableness')." *Id.* at 604.

2. Nor has respondent rebutted NextWave's showing that the court of appeals' decision conflicts with decisions of this Court and other appellate courts refusing to defer to agency interpretations that amount to nothing more than post-hoc litigating positions. Respondent does not dispute that the FCC's post-hoc "interpretations" of the auction terms to which the Second Circuit so completely deferred are statements that were inserted into FCC orders only after the FCC had been sued in bankruptcy actions by several C-Block licensees.

Respondent instead relies on *Auer v. Robbins*, 519 U.S. 452 (1997), but that decision is inapposite. *Auer* involved deference to the judgment of a federal agency announced in an *amicus* brief, not (as here) an agency interpretation adopted in direct response to litigation involving the agency itself. That distinction is crucial, as the conflicting decisions cited in the petition make clear. *See* Pet. 27. Indeed, in the very order to which the Second Circuit deferred (which was adopted more than six

months after NextWave commenced its avoidance action), FCC Commissioner Furchtgott-Roth wrote separately to highlight the fact that the order was driven entirely by "the Commission's C-Block bankruptcy litigation strategy," and that the licensee unfairly "found itself at the mercy of the FCC litigation tactics, not business necessities." *In re Applications for Assignment of Broadband Personal Communications Servs. Licenses*, FCC 98-301, 1998 WL 889489 (Dec. 23, 1998). The Second Circuit's decision nevertheless to defer to such a litigation-driven "interpretation" plainly conflicts with the decisions cited in the petition. *See* Pet. 26-28.

3. Respondent's suggestion that the deference issue may not be fully presented in this case is incorrect. The Second Circuit declined to resolve the fraudulent conveyance issue on the merits as a matter of bankruptcy law, instead basing its entire holding on deference to the FCC's litigation-generated interpretation of the agency's own contractual relationships: "Our ruling *is based on* the FCC's interpretation of its own regulations, to which courts owe deference, but to which the courts below refused deference on grounds we conclude are invalid." Pet. App. 28a (emphasis added).

Contrary to respondent's assertion, moreover, the decision below, and the FCC's interpretation upon which it is based, are inconsistent with general principles of contract and auction law. Thus, respondent's claim that "review of the deference issue . . . would not alter the judgment of the court of appeals" is mistaken.

Indeed, in addition to the reasons set forth in the petition (Pet. 28-30), respondent's brief provides further evidence that the court of appeals erred on the merits in concluding that NextWave's obligation to pay the full amount of the notes arose at the close of the auction, rather than at the time the licenses were granted and the promissory notes were executed. Relying on the FCC's arguments, the court concluded that the full payment obligation arose at the close of the auction because the po-

tential default penalties faced by high bidders were the functional equivalent of the full-payment obligation faced by defaulting licensees. Yet the FCC now takes the position—for the first time in this litigation—that it interprets the liabilities faced by a defaulting licensee to be potentially far *greater* than the contingent administrative penalties that would apply prior to the license being granted. Opp. 21-22 n.13. Thus, under respondent's new interpretation, it is incontrovertible that the granting of the license, and not merely the close of the auction, is the triggering event for the full repayment obligation faced by a defaulting licensee. Even under the flawed reasoning of the court of appeals, that interpretation would require entry of judgment for NextWave.

CONCLUSION

For the reasons set forth above and in the petition, this case merits plenary review. NextWave has filed contemporaneously herewith a closely related petition for a writ of certiorari seeking review of the Second Circuit's May 25, 2000, mandamus decision, which reaffirmed and expanded upon the jurisdictional holding announced in this case. *See* note 1, *supra*. Because the first question presented here is similar to the jurisdictional issue presented in the latter petition, the Court may wish to hold this petition pending receipt of the FCC's response to the latter petition and then consider both of these related petitions at the same time.

Respectfully submitted.

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